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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XC645

Taking of Threatened or Endangered Marine Mammals Incidental to Commercial Fishing Operations; Modification of Permit

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; request for comments

SUMMARY: NMFS is proposing to issue an amended permit to authorize the incidental, but not intentional, take of two stocks of marine mammals listed as threatened or endangered under the Endangered Species Act (ESA), under section 101(a)(5)(E) of the Marine Mammal Protection Act (MMPA), by the California (CA) thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) and the Washington (WA)/Oregon (OR)/CA sablefish pot fishery. In accordance with the MMPA, NMFS must issue this permit provided that it can make the determinations that: the incidental take will have a negligible impact on the affected stocks; a recovery plan for all affected stocks of threatened or endangered marine mammals has been developed or is being developed; and as required by the MMPA, a take reduction plan and monitoring program have been implemented, and vessels in the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) and the WA/OR/CA sablefish pot fisheries are registered. NMFS has made a preliminary determination that incidental taking from commercial fishing will have a negligible impact on the endangered humpback whale (CA/OR/WA stock) and the endangered sperm whale

(CA/OR/WA stock). Recovery plans have been completed for humpback and sperm whales. NMFS solicits public comments on the draft negligible impact determination (NID) and on the proposal to issue a permit to vessels that operate in these fisheries for the taking of affected endangered stocks of marine mammals.

**DATES:** Comments must be received by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** The draft amended Negligible Impact Determination and list of references contained in this notice are available in electronic form via the Internet at:

[http://www.westcoast.fisheries.noaa.gov/protected\\_species/marine\\_mammals/marine\\_mammals.html](http://www.westcoast.fisheries.noaa.gov/protected_species/marine_mammals/marine_mammals.html).

You may submit comments, identified by NOAA-NMFS-2013-0073, by any of the following methods:

Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal. Go to [www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0073](http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0073), click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.

Mail: Send comments or requests to: Chris Yates, Assistant Regional Administrator, Protected Resources Division, West Coast Region, 501 W. Ocean Blvd, Suite 4200; Long Beach, CA 90802. Comments may also be faxed to (562) 980-4027.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on

[www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Monica DeAngelis, NMFS West Coast Region, (562) 980-3232, or Shannon Bettridge, NMFS Office of Protected Resources, (301) 427-8402.

#### SUPPLEMENTARY INFORMATION:

##### Background

Section 101(a)(5)(E) of the MMPA, 16 U.S.C. 1361 et seq., states that NMFS, as delegated by the Secretary of Commerce, shall for a period of up to 3 years allow the incidental taking of marine mammal species listed under the ESA, 16 U.S.C. 1531 et seq., by persons using vessels of the United States and those vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1824(b), while engaging in commercial fishing operations, if NMFS makes certain determinations. NMFS must determine, after notice and opportunity for public comment, that: (1) incidental mortality and serious injury (M/SI) will have a negligible impact on the affected species or stock; (2) a recovery plan has been developed or is being developed for such species or stock under the ESA; and (3) where required under section 118 of the MMPA, a monitoring program has been established, vessels engaged in such fisheries are registered in accordance with section 118 of the MMPA, and a take reduction plan has been developed or is being developed for such species or stock.

NMFS proposes to issue an amended permit under MMPA section 101(a)(5)(E) to vessels registered in the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) to incidentally take individuals from two stocks of threatened or endangered marine mammals: the CA/OR/WA stock of humpback whales (*Megaptera novaeangliae*) and the CA/OR/WA stock of sperm whales (*Physeter macrocephalus*); and to vessels registered in WA/OR/CA sablefish pot fishery to incidentally take individuals from the CA/OR/WA stock of humpback whales. A history of MMPA section 101(a)(5)(E) permits related to these stocks was included in previous notices for other permits to take threatened or endangered marine mammals incidental to commercial fishing (e.g., 72 FR 60814, October 26, 2007; 78 FR 54553, September 4, 2013) and is not repeated here. The data for considering these authorizations were reviewed coincident with the 2014 MMPA List of Fisheries (LOF; 79 FR 14418, March 14, 2014), final 2013 U.S. Pacific Marine Mammal Stock Assessment (SAR; Carretta et al. 2014), Carretta and Moore (2014), Moore and Barlow (in press), the Fishery Management Plan (FMP) for U.S. West Coast Fisheries for Highly Migratory Species (HMS), recovery plans for these species (available on the Internet at: <http://www.nmfs.noaa.gov/pr/recovery/plans.htm#mammals>), the best scientific information and available data, and other relevant sources.

The previous permit was issued on September 4, 2013 (78 FR 54553), valid for a period of up to 3 years and expiring on September 4, 2016, and covered the CA/OR/WA stocks of humpback, fin, and sperm whale. Since issuing that permit, there have been significant changes in the information and conditions used to make the negligible impact determination for the permit issued on September 4, 2013 (78 FR 54553). This proposed MMPA 101(a)(5)(E) permit amends the previously issued permit, updates the information on the known biological and

ecological data on sperm and humpback whales, and updates information on human-caused mortality and serious injury (HCM/SI), since the September 2013 permit (78 FR 54553). This proposed 101(a)(5)(E) permit would not extend the expiration date and would remain effective until September 4, 2016. The draft amended NID does not include the CA/OR/WA fin whale stock because there has been no observed take of a fin whale in the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) for the past 15 years.

Based on observer data and marine mammal reporting forms, the vessels operating in the Category I CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) and the Category II WA/OR/CA sablefish pot fishery are the Category I and II fisheries that operate in the ranges of affected stocks, namely the CA/OR/WA stocks of humpback whale and sperm whale, and are currently considered for authorization. A detailed description of these fisheries can be found below. The CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) is the only Category I fishery operating off the coasts of California, Oregon, and Washington. The WA/OR/CA sablefish pot fishery is the only Federally-managed Category II fishery; all other Category II fisheries that may interact with the marine mammal stocks observed off the coasts of California, Oregon, and Washington are state-managed and are not considered for authorization under this permit. NMFS calculated the total known, assumed, or extrapolated HCM/SI to make a draft NID for this proposed authorization and included all human sources, such as commercial fisheries (not just the HCM/SI attributed to the two fisheries considered for authorization) and ship strikes. Participants in Category III fisheries are not required to obtain incidental take permits under MMPA section 101(a)(5)(E) but are required to report any mortality or injury of marine mammals incidental to their operations.

## Basis for Determining Negligible Impact

Prior to issuing a permit to take ESA-listed marine mammals incidental to commercial fishing, NMFS must determine if M/SI incidental to commercial fisheries will have a negligible impact on the affected species or stocks of marine mammals. NMFS satisfies this requirement through completion of a draft NID. NMFS clarifies that incidental M/SI from commercial fisheries includes M/SI from entanglement in fishing gear or ingestion of fishing gear. Indirect effects, such as the effects of removing prey from habitat, are not included in this analysis. A biological opinion prepared under ESA section 7 considers direct and indirect effects of Federal actions (available at <http://www.westcoast.fisheries.noaa.gov/>), and thus, contains a broader scope of analysis than is required by MMPA section 101(a)(5)(E).

Although the MMPA does not define “negligible impact,” NMFS has issued regulations providing a qualitative definition of “negligible impact” as defined in 50 CFR 216.103, and through scientific analysis, peer review, and public notice developed a quantitative approach. Thus, as it applies here, the definition of “negligible impact” is “an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to adversely affect the species or stock through effects on annual rates of recruitment or survival.” The development of the approach is outlined in detail in the current draft amended NID made available through this notice and was described in previous notices for other permits to take threatened or endangered marine mammals incidental to commercial fishing (e.g., 72 FR 60814, October 26, 2007; 78 FR 54553, September 4, 2013).

## Criteria for Determining Negligible Impact

In 1999, NMFS adopted criteria for making negligible impact determinations for MMPA 101(a)(5)(E) permits (64 FR 28800, May 27, 1999). In applying the 1999 criteria to determine whether M/SI incidental to commercial fisheries will have a negligible impact on a listed marine mammal stock, Criterion 1 is whether total known, assumed, or extrapolated HCM/SI is less than 10 percent of the potential biological removal level (PBR). If total known, assumed, or extrapolated HCM/SI is less than 10 percent of PBR, the analysis would be concluded, and the impact would be determined to be negligible. If Criterion 1 is not satisfied, NMFS may use one of the other criteria as appropriate. The remaining criteria describe alternatives under certain conditions. Criterion 2 is satisfied if the total known, assumed, or extrapolated HCM/SI is greater than PBR, but fisheries-related M/SI is less than 10 percent of PBR. If Criterion 2 is satisfied, vessels operating in individual fisheries may be permitted if management measures are being taken to address non-fisheries-related mortality and serious injury. Criterion 3 is satisfied if total fisheries-related M/SI is greater than 10 percent of PBR and less than PBR, and the population is stable or increasing. Fisheries may then be permitted subject to individual review and certainty of data. Criterion 4 stipulates that if the population abundance of a stock is declining, the threshold level of 10 percent of PBR will continue to be used. Criterion 5 states that if total fisheries-related M/SI are greater than PBR, permits may not be issued for that species or stock.

We considered two time frames for this analysis: 5 years (2009-2013) and 13 years (2001-2013). The first time frame we considered for both stocks of whales was the most recent 5-year period (here, January 1, 2009 through December 31, 2013) and is typically used for NID analyses. A 5-year time frame in many cases provides enough data to adequately capture year-

to-year variations in take levels, while reflecting current environmental and fishing conditions as they may change over time. However, NMFS' Guidelines for Assessing Marine Mammal Stocks (GAMMS) suggest that mortality estimates could be averaged over as many years as necessary to achieve a coefficient of variation of less than or equal to 0.3. For humpback whales, we used a 5-year period consistent with the general recommendations in NMFS GAMMS for our final determination.

However, Carretta and Moore (2014) recommend pooling longer time series of data when bycatch is a rare event. For example, pooling 10 years of fishery data resulted in bycatch estimates within 25 percent of the true bycatch rate over 50 percent of the time (i.e., estimates were within 25 percent of the true value more often than not). Key to this approach was that the fishery must have had sufficiently constant characteristics (e.g., effort, gear, locations) to support the inference of consistent results across years such as with the CA thresher shark/swordfish drift gillnet fishery. Rare bycatch events typically involve smaller populations paired with low observer coverage in a fishery. If true bycatch mortality is low, but near PBR, then estimation bias needs to be reduced to allow reliable evaluation of the bycatch estimate against a low removal threshold.

Currently, the sperm whale is the only ESA-listed marine mammal species interacting with the thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) meeting the conditions described in Carretta and Moore (2014): the stock has a relatively small minimum population estimate ( $N_{\min}$ ) and a member of the stock was recently recorded as having been incidentally killed or seriously injured in a rare event (in the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh)). The post-2000 time period best represents the current spatial state of the fishery



and we therefore used the 13-year period post-2000 to calculate mean annual mortality estimate for this stock of sperm whales, based on recommendations contained in the GAMMS and Carretta and Moore (2014).

Moore and Barlow (in press) used a Bayesian hierarchical trend model for the CA/OR/WA sperm whale stock to more efficiently incorporate all available survey information to calculate the population abundance estimate using a longer time series to improve the precision of abundance estimates. This new analysis by Moore and Barlow (in press) estimates the minimum abundance at 1,332 sperm whales, using the Bayesian hierarchical trend modeling of sighting data from 2001-2012. The associated PBR for the CA/OR/WA stock of sperm whales is 2.7.

#### Negligible Impact Determinations

As explained above, the proposed permit amendment relies on a NID that uses a new 13-year period for averaging sperm whale bycatch rates rather than the 5-year period generally recommended in the NMFS GAMMS. We used a 5-year period for humpback whales consistent with the general recommendations in NMFS GAMMS for our final determination (note that a 13-year time period (2001-2013) also resulted in a finding of negligible impact for humpback whales). The PBR for the CA/OR/WA humpback whale stock is 11 animals.

The draft amended NID made available through this notice provides a complete analysis of the criteria for determining whether commercial fisheries off California, Oregon, and Washington are having a negligible impact on the CA/OR/WA stocks of humpback whale and sperm whale. A summary of the analysis and subsequent determination follows.

#### Criterion 1 Analysis

Criterion 1 would be satisfied if the total known, assumed, or extrapolated human-caused M/SI is less than 10 percent of PBR. The 5-year (2009-2013) average annual HCM/SI to the CA/OR/WA stock of humpback whales from all human sources is 5.0 or 45.45 percent of the PBR. The 13-year (2001-2013) average annual HCM/SI to the CA/OR/WA stock of sperm whales from all human sources is 1.7 or 65.5 percent of the PBR. Criterion 1 was not satisfied because the total known, assumed, or extrapolated HCM/SI for these stocks is not less than 10 percent of PBR for the respective time period considered. As a result, the other criteria must be examined for the CA/OR/WA stocks of humpback and sperm whales.

#### Criterion 2 Analysis

Criterion 2 is satisfied if total known, assumed, or extrapolated HCM/SI are greater than PBR and the total fisheries-related mortality is less than 10 percent of PBR. Criterion 2 was not satisfied for the CA/OR/WA stocks of humpback whales or sperm whales for each time frame considered, based on the calculations described under Criterion 1. As a result, the other criteria were examined.

#### Criterion 3 Analysis

Unlike Criteria 1 and 2, which examine total know, assumed, or extrapolated HCM/SI relative to PBR, Criterion 3 compares total fisheries-related M/SI to PBR. Criterion 3 would be satisfied if the total commercial fisheries-related M/SI (including state and federal fisheries) is greater than 10 percent of and less than 100 percent of PBR for each stock for the respective time frame considered, and the populations of these stocks are considered to be stable or increasing. If the Criterion is met, vessels may be permitted subject to individual review and certainty of data.

Criterion 3 was satisfied for the CA/OR/WA humpback whale stock as the fishery-related M/SI from all commercial fisheries for the CA/OR/WA humpback whale stock is estimated at 40 percent of PBR (5-year average from 2009-2013 and between 10 percent and 100 percent of PBR), the stock has experienced a positive growth rate (8 percent per year), and there have been few known or assumed M/SI due to the subject fisheries.

Criterion 3 was satisfied for the CA/OR/WA sperm whale stock as the total fishery-related M/SI is greater than 10 percent of and less than 100 percent of PBR, and the population is stable. The fishery-related M/SI from all commercial fisheries for the CA/OR/WA sperm whale stock is estimated at 57 percent of PBR for the 13-year period of 2001-2013. A total of two sperm whales have been observed by NMFS' Federal observers as either seriously injured or killed in the CA thresher shark/swordfish drift gillnet fishery during the 13-year period since 2000. None have been observed interacting with the WA/OR/CA sablefish pot fishery. The observed sperm whale takes were extrapolated by the percent observer coverage for that year. In 2010, the observer coverage was 11.9 percent and thus, the two observed animals are extrapolated to a total of 16 animals. Over the 13-year period this results in a bycatch rate that is 57 percent of PBR.

In addition, Moore and Barlow (in press) provided new analyses that suggest that the revised abundance estimates are higher and more stable across years than currently published values. Accordingly, Criterion 3 is satisfied in determining that M/SI of the CA/OR/WA sperm whale stock incidental to commercial fishing would have a negligible impact on the stock because of individual review of data regarding the stock, including that the level of HCM is below the estimated PBR and the stock is stable.

In conclusion, based on the criteria outlined in 1999 (64 FR 28800), the final 2013 U.S. Pacific Marine Mammal Stock Assessment report (SAR; Carretta et al., 2014), Carretta and Moore (2014), Moore and Barlow (in press), and the best available scientific information, available data and other sources, NMFS has determined that the M/SI incidental to the CA thresher shark/swordfish drift gillnet fishery and the WA/OR/CA sablefish pot fishery will have a negligible impact on the CA/OR/WA stock of humpback whales and the CA thresher shark/swordfish drift gillnet fishery will have a negligible impact on the CA/OR/WA stock of sperm whales. NMFS therefore issues the draft amended NID and proposes to modify the MMPA 101(a)(5)(E) permit issued on September 4, 2013, for the remainder of the 3- year period, expiring September 4, 2016. Specifically, NMFS proposes that vessels operating in these identified commercial fisheries within the range of the CA/OR/WA humpback and sperm whale stocks may be permitted subject to individual review of the fishery and the certainty of relevant data, and provided that the other provisions of section 101(a)(5)(E) are met.

#### Description of Fisheries

The following are the Federally-authorized fisheries classified as Category I and II in the 2014 LOF (NMFS 2014), which are known to kill or seriously injure ESA-listed marine mammals incidental to commercial fishing operations. Detailed descriptions of those fisheries can be found in the NMFS (2012) Final Biological Opinion on the groundfish fishery management plan, dated December 7, 2012, for the fisheries addressed in that Biological Opinion; the NMFS (2013) Biological Opinion for the with the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh); the SARs (Carretta et al. 2014); and the draft NID (<http://www.westcoast.fisheries.noaa.gov/>).

### California Thresher Shark/Swordfish Drift Gillnet Fishery ( $> 14$ in mesh)

Participants in the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) are also required to have a valid permit issued annually by the California Department of Fish and Wildlife. In accordance with MMPA section 118(c), only those vessels participating in the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) that have registered with the Marine Mammal Authorization Program are authorized to take marine mammals incidental to their fishing operations. Vessels holding this authorization must comply with the Pacific Offshore Cetacean Take Reduction Plan and implementing regulations. Any vessel that violates regulations will be subject to enforcement action. The estimated number of vessels in the fishery is based upon the number of vessels that indicated intent to participate in the fishery according to historical reference and may not be an accurate estimate of the number of vessels actively engaged in fishing in any given year. The CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) is a limited entry program, managed with gear, seasons, and area closures. The number of vessels participating in the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) has decreased from 148 permits issued and 98 active vessels in 1998 to 72 permits issued and 19 active vessels in 2013 (CDFW License and Revenue Branch, extracted June 13, 2014). Information on the number of active permit holders was obtained from the “Status of the U.S. west coast fisheries for HMS through 2004; Stock Assessment and Fishery Evaluation” report, available from the Pacific Fishery Management Council Web site ([www.pcouncil.org](http://www.pcouncil.org)).

The CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) targets swordfish and thresher shark. It operates outside of state waters from the U.S./Mexico border in the south to the Oregon border in the north, depending on sea temperature conditions. Regulations restrict

the fishery to waters outside 200 nm from February 1 through April 30, outside 75 nm from May 1 through August 14, while allowing fishing inside 75 nm from August 15 through January 31. Vessels in this fishery targeting swordfish tend to set on warm ocean water temperature breaks, which do not appear along the California coast until late summer. Because of these restrictions, vessels are not active during February, March, and April, and very little fishing effort occurs during the months of May, June, and July.

In 2001, a seasonal (15 August–15 November) area closure was implemented in the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) north of Point Conception to protect leatherback turtles that feed in the area and were observed entangled in previous fishing seasons. Additional seasonal/area closures in southern California have been established in the CA thresher shark/swordfish DGN fishery to protect loggerhead turtles during a forecast or occurring El Nino event during the months of June, July and/or August.

The NMFS West Coast Region has operated an at-sea observer program in the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) since July 1990 to the present, and the California Department of Fish and Wildlife operated a drift gillnet observer program from 1980–90. The objectives of the NMFS observer program are to record, among other things, information on non-target fish species and protected species interactions. Information regarding the thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) interactions with listed marine mammal species was drawn from observer program records for the calendar years 1990–2013 (NMFS, 2014). NMFS typically targets 20 percent observer coverage of the annual sets by the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) fleet, with close to 100 percent

of net retrievals monitored on observed trips for, among other things, species identification and enumeration.

#### Washington/Oregon/CA Sablefish Pot Fishery

The WA/OR/CA sablefish pot fishery targets sablefish using trapezoid, conical, or rectangular steel frame traps (NMFS, 2005), wrapped with 3.5 inch nylon webbing. The fishery generally sets gear in waters past the 100 fathom (600 ft; 182.88 m) curve off the west coast of the United States. The fishery is managed under regulations implementing the West Coast Groundfish FMP developed by the Pacific Fishery Management Council. There are two separate trap fisheries for sablefish: limited entry and open access. The limited entry fishery is further divided into: (1) vessels fishing in the limited entry fixed gear fishery with a limited entry permit endorsed for pot and/or longline gear, and (2) (since 2011) vessels fishing in the limited entry trawl fishery with a limited entry permit endorsed for trawl gear but fishing with “non-trawl” gear including pot gear (called “gear switching” in the trawl fishery’s Shore-based Individual Fishing Quota Program).

The primary fishery (limited entry) is composed of a three-tier system of cumulative landing quotas within a restricted season, from April 1 to October 31. Permits were assigned to a tier based on landing history when the system originally began in 1998. There are 32 Limited Entry Permits issued for the sablefish trap fishery on the West Coast (NWFSC, 2010), and the current estimated number of participants is 309. Fishing outside of the primary season or after fulfillment of tier quota is allowed subject to daily and weekly trip limits (NWFSC, 2010). The limited entry permits are currently associated with vessels spread throughout the Pacific Northwest from Northern California through Washington. Up to three permits may be stacked

for cumulative landings on one vessel; including both trap and longline gear endorsements (NWFSC, 2010). Accounting for stacking of permits, there were 41 vessels using traps only and five using a combination of traps and longline to catch their quota of sablefish in 2014 (NWFSC, 2014).

The open access fishery is available to fishermen year round. North of 36° N. (California), the trip limit is 300 lb/day or 1 landing of 700 lb per week, not to exceed 2,100 lb over 2 months. South of 36° N, the limit goes up to 350 lb/day or one landing of 1,050 lb per week. NOAA's Northwest Fisheries Science Center estimates 204 fishermen (number of permits, not reflective of number of active fishermen) participating in the open access sector in 2014 based on a query, conducted on June 17, 2014 of the NMFS groundfish website ([https://www.webapps.nwfsc.noaa.gov/apex\\_ifq/f?p=112:23](https://www.webapps.nwfsc.noaa.gov/apex_ifq/f?p=112:23)).

In California, a general trap permit is required for the open access sector for sablefish and gear is set outside 150 fathoms, with an average depth of 190 fathoms. South of Point Arguello, near Santa Barbara, the minimum depth for setting traps targeting sablefish is 200 fathoms. There is no depth requirement north of Point Arguello. Daily logbook reporting is required by the state. Multiple traps are connected to a common ground line, 5/8th inch nylon line, at depths between 100 and 375 fathoms up to 600 fathoms with an average of 190 fathoms in California (NMFS, 2010). Traps are spaced on average 20 fathoms apart, with a range of 15 to 40 fathoms (NMFS, 2005). Limited entry permit holders will commonly fish 20 to 30 traps per string, as opposed to open access fishermen who fish several smaller strings of one to eight strings with three to four traps per string (NMFS, 2010), each with a float line and buoy stick.

Conclusions for Proposed Permit



Based on the above assessment and as described in the accompanying draft NID, NMFS concludes that the incidental M/SI from the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  in mesh) and WA/OR/CA sablefish pot fishery will have a negligible impact on the CA/OR/WA stock of humpback whales and the CA/OR/WA stock of sperm whales, and the WA/OR/CA sablefish pot fishery will have a negligible impact on the CA/OR/WA stock of humpback whales.

The National Environmental Policy Act (NEPA) requires Federal agencies to evaluate the impacts of alternatives for their actions on the human environment. The impacts on the human environment of continuing and modifying the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  inch mesh) (as part of the HMS fisheries) and the WA/OR/CA sablefish pot fishery (as part of the West Coast groundfish fisheries), including the taking of threatened and endangered species of marine mammals, were analyzed in: the Pacific Fishery Management Council Highly Migratory Species FMP final environmental impact statement (August 2003); the Pacific Fishery Management Council Proposed Harvest Specifications and Management Measures for the 2013–2014 Pacific Coast Groundfish Fishery and Amendment 21–2 to the Pacific Coast FMP (September 2012); Risk assessment of U.S. West Coast groundfish fisheries to threatened and endangered marine species (NWFSC, 2012); and in the Final Biological Opinion prepared for the West Coast groundfish fisheries (NMFS, 2012) and the draft Biological Opinion for the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  inch mesh) (NMFS, 2013), pursuant to the ESA. Because this proposed permit would not modify any fishery operation and the effects of the fishery operations have been evaluated fully in accordance with NEPA, no additional NEPA analysis is required for this permit. Issuing the proposed permit would have no additional impact

to the human environment or effects on threatened or endangered species beyond those analyzed in these documents. NMFS now reviews the remaining requirements to issue a permit to take the subject listed species incidental to the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  inch mesh) and WA/OR/CA sablefish pot fisheries.

### Recovery Plans

Recovery Plans for humpback whales and sperm whales have been completed (see <http://www.nmfs.noaa.gov/pr/recovery/plans.htm#mammals>). Accordingly, the requirement to have recovery plans in place or being developed is satisfied.

### Vessel Registration

MMPA section 118(c) requires that vessels participating in Category I and II fisheries register to obtain an authorization to take marine mammals incidental to fishing activities. Further, section 118(c)(5)(A) provides that registration of vessels in fisheries should, after appropriate consultations, be integrated and coordinated to the maximum extent feasible with existing fisher licenses, registrations, and related programs. Participants in the CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  inch mesh) and WA/OR/CA sablefish pot fisheries already provide the information needed by NMFS to register their vessels for the incidental take authorization under the MMPA through the Federal groundfish limited entry permit process of the Federal Vessel Monitoring System. Therefore, vessel registration for an MMPA authorization is integrated through those programs in accordance with MMPA section 118.

### Monitoring Program

The CA thresher shark/swordfish drift gillnet fishery ( $\geq 14$  inch mesh) has been observed since the early 1990s. Levels of observer coverage vary over years but are adequate to produce

reliable estimates of M/SI of listed species (e.g., from 2000–2012, coverage ranged from approximately 12 to 22.9 percent). As part of the West Coast groundfish fishery and Magnuson-Stevens Fishery Conservation and Management Act objectives, the WA/OR/CA sablefish pot fishery, as managed under the groundfish FMP, and was observed in 2012 at approximately 73 percent. Accordingly, as required by MMPA section 118, a monitoring program is in place for both fisheries.

#### Take Reduction Plans

Subject to available funding, MMPA section 118 requires the development and implementation of a Take Reduction Plan (TRP) in cases where a strategic stock interacts with a Category I or II fishery. The two stocks considered for this permit are designated as strategic stocks under the MMPA because they are listed as endangered under the ESA (MMPA section 3(19)(C)).

In 1996, NMFS convened a take reduction team (TRT) to develop a TRP to address the incidental taking of several strategic marine mammal stocks, including CA/OR/WA stocks of sperm whales and humpback whales, in the CA thresher shark/swordfish drift gillnet fishery ( $\geq$  14 in mesh). The Pacific Offshore Cetacean TRP was implemented through regulations in October, 1997 (62 FR 51813) and has been in place ever since. Although a TRP is in place for the gillnet fishery, there is not one in place for the pot fishery.

The short- and long-term goals of a TRP are to reduce mortality and serious injury of marine mammals incidental to commercial fishing to levels below PBR and to a zero mortality rate goal, defined by NMFS as 10 percent of PBR, respectively. MMPA section 118(b)(2) states that fisheries maintaining such M/SI levels are not required to further reduce their M/SI rates.

However, the obligations to develop and implement a TRP are subject to the availability of funding. MMPA section 118(f)(3) (16 U.S.C. 1387(f)(3)) contains specific priorities for developing TRPs. NMFS has insufficient funding available to simultaneously develop and implement TRPs for all stocks that interact with Category I or Category II fisheries. As provided in MMPA section 118(f)(6)(A) and (f)(7), NMFS used the most recent SARs and LOF as the basis to determine its priorities for establishing TRTs and developing TRPs. Through this process, NMFS evaluated the CA/OR/WA stock of humpback whales and the WA/OR/CA sablefish pot fishery and identified it as a lower priority compared to other marine mammal stocks and fisheries for establishing TRTs, based on population trends of the stock and M/SI levels incidental to that commercial fishery. In addition, NMFS continues to collect data to categorize fixed gear fisheries and assess their risk to large whales off the U.S. west coast. Accordingly, given these factors and NMFS' priorities, implementation of the developing TRP for the WA/OR/CA sablefish pot trap fishery and other similar Category II fisheries will be deferred under section 118 as other stocks/fisheries are a higher priority for any available funding for establishing new TRPs.

As noted in the summary above, all of the requirements to issue a permit to the following Federally-authorized fisheries have been satisfied: the CA thresher shark/swordfish DGN fishery ( $\geq 14$  inch mesh) and WA/OR/CA sablefish pot fishery. Accordingly, NMFS proposes to issue a permit to participants in these Category II fisheries for the taking of CA/OR/WA humpback whales and CA/OR/WA sperm whales incidental to the fisheries' operations. As noted under MMPA section 101(a)(5)(E)(ii), no permit is required for vessels in Category III fisheries. For

incidental taking of marine mammals to be authorized in Category III fisheries, any mortality or serious injury must be reported to NMFS.

#### Solicitation of Public Comments

NMFS solicits public comments on the proposed permit and the preliminary determinations supporting the permit. Specifically, we seek comments on:

- The use of the revised abundance estimates in Moore and Barlow (in press); and
- The use of a 13-year time period for estimating expected incidental mortality of sperm whales in the gillnet fishery.

Dated: August 20, 2014.

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